Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2024 CHRT 92
Date: July 30, 2024
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

Ruling

Members: Sophie Marchildon
Edward P. Lustig

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Ruling on a confidentiality order request pursuant to section 52 of the Canadian Human Rights Act (*CHRA*)

I. Context

[1] The Tribunal has retained its jurisdiction on all its orders including Jordan's Principle orders with the exception of compensation since the Revised Settlement Agreement was approved by this Tribunal (2023 CHRT 44). The Tribunal's focus is ensuring that the systemic discrimination found is eliminated and does not reoccur so that First Nations children and families can live safely and thrive in their homes with their families and their communities. This will be achieved in the long-term especially if programs and services are prevention oriented and are designed and delivered by First Nations themselves in respecting their inherent right of self-governance and if the programs and services are sustainably and adequately funded and resourced by Canada who has a legal obligation to cease and desist the systemic discrimination found under the Tribunal's orders. The Tribunal also recognizes that not all First Nations will opt to deliver the services at this time, therefore Canada still has an important role to play and legal and positive obligations toward First Nations and First Nations Peoples regardless of whether they decide to deliver services or not.

[2] The Caring Society brought a non-compliance motion regarding Canada's implementation of Jordan's Principle before this Tribunal. Canada also brought a cross-motion seeking a different approach. In the course of these motions' proceedings, the AGC brought a written request to the Tribunal to seek confidentiality orders to protect sensitive information regarding third party children, caregivers and families. The AGC sought a confidentiality order for 5 categories of information included in the AGC's affidavits and materials and provided redacted copies and unredacted confidential copies to the parties and the Tribunal. The latter were covered by this Tribunal's March 18, 2024 interim ruling up to the issuance of the Tribunal's ruling on this issue. The Tribunal subsequently reviewed the AFN's materials filed after Canada's materials were filed and allowed the AFN's materials to be publicly disclosed. On March 28, 2024, the Tribunal rendered its ruling (similar to a ruling made on the bench) in the form of a letter-decision summary ruling with reasons to follow. The reasons are detailed here.

II. An important consideration in this case

[3] While this case is about children, the children themselves or their caregivers are not parties in this case. Except for a few examples, the children and their caregivers did not put their medical or personal information forward for the purpose of these proceedings. This is an important consideration that the Tribunal has kept at the forefront of its proceedings. While these proceedings have followed the open court principle/public access to the proceedings and record from the very beginning and continue to do so, the Tribunal and the parties agreed it was in the best interest of children to protect their names and personal information from widespread publication, unless their names are already in the public domain or their legal caregivers' consent to disclose them. The Tribunal's approach has focused on preserving the dignity of all involved especially First Nations children and the need to avoid revictimizing them. For example, in the compensation ruling, the Tribunal weighed difficulties of establishing a process versus the risk to revictimize children:

> Furthermore, the impracticalities and the risk of revictimizing children outweigh the difficulty of establishing a process to compensate all the victims/survivors and the need for the evidence presented of having a child testify on how they felt to be separated from their family and community,
> (See 2019 CHRT 39 at para 189).

[4] This case is high profile. The media is present and filming and the case is the object of two National film board documentaries presented at the Toronto International Festival and generating lots of attention in Canada and abroad. This case has attracted international attention by multiple organizations including the United Nations[1].

[5] The online public campaign named: I Am a Witness[2] , invites people to learn about the case on First Nations child welfare and Jordan's Principle and posts all Tribunal

[1] In 2016, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) recommended that Canada review and increase its funding to family and child welfare services to Indigenous Peoples living on reserve and to fully comply with the Tribunal's January 26, 2016 Decision, (see Affidavit of Dr. Blackstock at par. 33 and Exhibit L: CESCR March 23, 2016, Concluding Observations), (see 2018 CHRT 4 at paragraph 82 and 191).
[2] https://fncaringsociety.com/i-am-witness

documents filed in this case. There are currently thousands of registered members for this campaign [3] .

[6] Therefore, this unique context coupled with children and their families being third parties including many who are unaware that their cases are discussed in these proceedings and the need to preserve their dignity and their own control over their personal information form part of a specific factual matrix that must be taken into consideration when applying the open court principle and section 52 of the *Canadian Human Rights Act*, RSC 1985, c H-6 (*CHRA*).

[7] Further, our justice system largely protects the identities of children even in protection cases where the children are directly involved.

[8] The Supreme Court recognized that, where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress, (See *Nordhage-Sangster v Canada Border Services Agency and Pridmore*, 2023 CHRT 45 at paras 26-27, citing *Sherman Estate v Donovan*, 2021 SCC 25 at para 72).

[9] On the procedural aspect of this confidentiality order request, the Panel agrees with the Tribunal's recent approach as it will be explained further below. The only distinctions to be made here in this case is that the case continues to proceed under the old rules and the Panel was proceeding on a motion that was qualified by the Caring Society as urgent given that it involves services to children in dire situations.

[10] The Tribunal addressed this confidentiality request in an expeditious and informal manner in order to preserve the hearing schedule established on the basis that the motion was alleged to be urgent. Any request for formality would have delayed the timeline for submissions and jeopardized the cross-examination hearing. In accordance with the Tribunals previous rules of procedure that continue to govern these proceedings, the Tribunal exercised its discretion to address this confidentiality request informally and without the need for a formal motion. This is consistent with Rule 1 of the Canadian Human Rights

[3] Information available in the public domain.

Rules of Procedure (03-05-04) and s. 48.9(1) of the *CHRA*. Moreover, the decision to proceed urgently, is the main consideration for moving away from formality in this particular context of urgent service delivery to First Nations children. Applying rule 3 in the old Rules of Procedure (03-05-04) in accordance with rule 1 and the *CHRA* in a purposive manner, this Tribunal found that it could authorize a clearly worded confidentiality order request by way of an informal letter rather than by way of a formal motion. The analysis remains a case-by-case basis. In this case, the request was made at the very last minute, on the eve of the filing of some important materials and the request for a formal motion, as mentioned above, would have delayed the entire filing of materials and ultimately the cross-examinations. This Tribunal opted for an expedited approach while keeping in mind that it could ask further clarifications if needed. Finally, subsection 48.9(1) of the *CHRA* proceedings before the Tribunal are to be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow. This is reflected in rule 1 of the Rules of Procedure (03-05-04).

III. The request for confidentiality orders is granted in part

[11] The different order requests will be addressed in turn below.

IV. Parties' submissions

A. The Attorney general of Canada (AGC) representing Indigenous Services Canada (ISC)

[12] The AGC requests an order of confidentiality pursuant to section 52 of the *CHRA.* In sum, the AGC submits that the protection of information relating to children (and their families) is a matter of public interest. Pursuant to the *Privacy Act*, RSC 1985, c P-21, Indigenous Services Canada (ISC) is obliged to ensure that such personal information remains protected to the extent possible. In this case, the public interest in the protection of such personal information outweighs the public interest in open Tribunal proceedings. It is open to the Caring Society to, for example, refer to third party individuals in their submissions. However, ISC must consider whether the Crown's affidavit evidence, when

coupled with the Caring Society's affidavit evidence, could lead to the identification of any specific individual, including a child. If the answer to this question is yes, ISC must seek to protect that information, subject to one of the exceptions found in the *Privacy Act*. These exceptions include where there is an order permitting the information's release, and generally for use in legal proceedings against the Crown in right of Canada.

[13] In the context of a legal process, the AGC submits that it can share third party personal information with the parties. However, this does not mean that this personal information can be, or should be, shared with the public at large. In some cases, redactions of this personal information are appropriate.

[14] As noted by the CHRC, the presumption in favour of open Tribunal proceedings is very strong, but not absolute. By virtue of section 52 of the *CHRA,* the Tribunal is afforded broad powers to order any confidentiality measures deemed necessary in certain circumstances. Section 52 provides the Tribunal may impose confidentiality measures if there is a real and substantial risk that disclosure of personal or other matters will cause undue hardship to the persons involved (see 52(1)(c)). Undue hardship requires more than ordinary hardship and evidence of harm, or the potential for harm must be predicted with reasonable certainty.

[15] The AGC advances that in *Sherman Estate*, the Supreme Court held that the "important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity." In 2018 CHRT 27, this Tribunal recognized the public interest in protecting sensitive personal information about First Nations children. The Tribunal also noted that privacy concerns might be heightened for people living in small communities, as the disclosure of even seemingly non-identifying information might allow individuals to be identified in the community. It is this type of information that the AGC seeks to protect in this case.

[16] Even though the Tribunal's decision in 2018 CHRT 27 pre-dates *Sherman Estate*, the Tribunal's consideration of the factors relating to disclosure of personal information remains relevant and applicable to Canada's confidentiality order request.

[17] The AGC also submits that in assessing whether particular third-party personal information could be injurious if disclosed, it is important to be mindful of the mosaic effect. As explained by the Federal Court in *Canada (Attorney General) v. Khawaja*,2007 FC 490 the "mosaic effect" is a principle which stipulates that each piece of information should not be considered in isolation. Seemingly unrelated pieces of information, which may not be particularly sensitive by themselves, could be used to develop a more comprehensive picture when assessed as a group.

[18] In isolation, information such as a file number or an item number may not be sufficient to identify a particular First Nations child or family. However, in this case that information may be cross-referenced against the information in the Caring Society's affidavits. Viewed together, the disclosure of the personal information including initials, file number, item number, and type of product, support or service requested, constitutes the disclosure of personal information which could cause undue hardship to children, and their families. This is particularly so when considering that many of the third parties reside in small communities, where cases or circumstances may be well known to community members. The potential of harm to First Nations children and families can be predicted with reasonable certainty.

[19] According to the AGC, such hardship could include stigmatization, discrimination or unwanted judgment from the public which could affect emotional, personal, social or future professional life, and cause damage to dignity. As stated by the Supreme Court of Canada in *Sherman Estate* at para. 77, "the question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences." Should the proposed redacted information in the Dr. V. Gideon and St-Aubin affidavits be disclosed publicly, it poses a serious risk to an important public interest - the protection of quasi-health information. The confidentiality order sought is necessary to prevent this serious risk to the individuals' interests, as there are no other reasonable measures which will prevent this risk. As demonstrated below, as a matter of proportionality, the benefits of the confidentiality order outweigh its negative effects.

B. The Caring Society

[20] The Caring Society is not opposed to the redactions proposed to paragraphs 20-29 and Exhibit "A" of Ms. St-Aubin's affidavit, with the exception of the specific redactions which the Tribunal will return to under each request below regarding paragraphs 23 and 24. While the Caring Society's view is that any concerns related to privacy would be sufficiently addressed by the use of initials (as was done in the Caring Society's materials on this motion and in many other situations in this case), the redactions proposed are consistent with the confidentiality order made in 2018 CHRT 27 (confirming an oral ruling made on May 9, 2018 regarding a COO affidavit filed in response to Canada's November 2017 compliance report affidavits). It bears noting, however, that that ruling was made prior to the Tribunal's adoption of the *Sherman Estate* factors.

[21] However, the Caring Society does not support the redactions made to Dr. Gideon's affidavit. Despite it being the party that bears the onus on this motion, the Attorney General of Canada has provided no submissions or evidence regarding the test under paragraph 52(1)(c) of the *CHRA* and, in any event, the Caring Society's view is that that test is not met for the balance of the redactions.

C. The Assembly of First Nations, the Chiefs of Ontario and the Nishnawbe Aski Nation

[22] The AFN, the COO and the NAN all have decided not to file submissions on the confidentiality order requests.

D. The Canadian Human Rights Commission (the Commission)

[23] The Commission takes no position on whether the Panel should or should not grant the confidentiality measures requested. Instead, it simply asks the Tribunal to apply the law discussed in the Commission's submissions and consider the following points as part of its analysis.

[24] First, the obligation is on Canada as the moving party to show that the high threshold for a confidentiality order is met. In this regard, Canada's email dated March 14, 2024, says very little about why the requested measures are appropriate under s. 52 of the *CHRA* or the *Sherman Estate* framework. It is not generally enough to say that a document contains sensitive personal information, as that term is defined in the *Privacy Act* or otherwise. Most human rights cases involve such information. Instead, a moving party should explain (i) how public disclosure would result in a serious risk to one of the important public interests described in ss. 52(1)(a) to (d) of the *CHRA*, (ii) why no less intrusive measures would alleviate that risk, and (iii) how the benefits of the requested measures outweigh the impacts.

[25] Second, the Tribunal and the parties have recognized in the past that confidentiality measures are appropriate to protect the identities of First Nations children and families whose cases are at issue.

[26] In 2018, in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2018 CHRT 27, the Panel ordered on consent of all parties that an affidavit filed by Chiefs of Ontario (COO) not be made public. The affidavit described a case that had arisen in a small community. Although it did not contain the child's personal information, COO was sensitive to the fact that the case might be well known to community members. The Panel later clarified in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2020 CHRT 17, at para 20, that because of the detailed nature of the information in the affidavit, the child and child's family "would have been easily identified" if the affidavit had been disclosed.

[27] At the same time, the Panel has been satisfied with less intrusive confidentiality measures in other similar contexts. For example, in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 7 at paras 57-86, it has determined some matters on affidavit evidence that used initials in place of full names. This can be seen in the Panel's 2019 ruling on interim relief relating to eligibility for services under Jordan's

Principle. There the Panel discussed details of the illustrative case of S.J. and her family, without any concerns being raised with respect to confidentiality.

[28] If the Tribunal considers the information in the current affidavits to resemble that which was at issue in 2018 CHRT 27, it may be inclined to authorize the redaction of that information from the public-facing version of the affidavits.

[29] On the other hand, if it considers the information to resemble that which was at issue in 2019 CHRT 7, it may be inclined to dismiss the motion on the basis that the use of initials has satisfactorily addressed any concerns about the disclosure of sensitive information that could cause undue hardship to First Nations children and families.

[30] Third, Canada has proposed redacting the names and biographical information of the external members of the Jordan's Principle Appeals Committee.

[31] Canada's email of March 14, 2024, does not offer a rationale for this proposal, aside from the general point that the information is personal information. Furthermore, even if a document contains personal information, that is not enough to justify an exception to the open court principle. There must also be a basis for concluding the requirements of s. 52(1) and Sherman Estate are met.

[32] In considering this proposal, the Panel may wish to note that the *Privacy Act*, s. 3 – definition of "personal information", paragraphs (j) and (k), does not include names or other prescribed information about government employees, or persons contracted to perform services for government institutions. These statutory exclusions show the existence of a public interest in having access to information about those who perform governmental services.

V. Applicable Law

[33] The *CHRA* stipulates that a hearing is conducted in public subject to a confidentiality order pursuant to section 52 of the *CHRA*. In other words, the open court principle is a requirement entrenched in the quasi-constitutional *Act*. While this requirement is not absolute given that the *Act* provides for some exceptions listed in the text of section 52 of

the *CHRA*, the threshold to apply an exception is high. Moreover, as it will be discussed further below, the Supreme Court of Canada (SCC) in *Sherman Estate* found that the open court principle is a constitutional right.

> 52 (1) An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that
>
> > (a) there is a real and substantial risk that matters involving public security will be disclosed;
> > (b) there is a real and substantial risk to the fairness of the inquiry such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public;
> > (c) there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public; or
> > (d) there is a serious possibility that the life, liberty or security of a person will be endangered.
>
> (2) If the member or panel considers it appropriate, the member or panel may take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of a hearing held in respect of an application under subsection (1).

[34] It is not sufficient for a party to request a confidentiality order or to obtain consent from the other parties for the Tribunal to issue an order under section 52 of the *CHRA*. The Tribunal must go through the analysis set out in section 52 of the *CHRA*.

[35] In *White v Canadian Nuclear Laboratories,* 2020 CHRT 5, at para 50, the Tribunal determined that it is required to consider the openness of legal proceedings and determine whether the party seeking the order has established that there is a serious risk, well-grounded in the evidence, which poses a threat to an important interest in the context of the litigation because reasonably alternative measures will not prevent the risk (See *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41, [2002] 2 S.C.R.522 at paras 48 and 53, and *Dagenais v. Canadian Broadcasting Corp*., 1994 CanLII 39 (SCC), 1994 3 S.C.R. 835 and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R.442).

[36] Furthermore, the party requesting the confidentiality order has the burden of proof (onus) to meet the requirements set out in section 52 of the *CHRA* to establish that any proposed limits on the open court principle are necessary and appropriate in all the circumstances of the case, (See *Woodgate et al. v. Royal Canadian Mounted Police*, 2021 CHRT 20 at para 25). The Tribunal recently stated that a high bar must be met to satisfy the requirements of s. 52 of the *CHRA* and the test set out in *Sherman Estate v Donovan*, 2021 SCC 25 [*Sherman Estate*]. The Tribunal has also held that the *Sherman Estate* framework is generally consistent with s. 52 of the *CHRA* and informs the statutory analysis. (See, *Abdul-Rahman v. Transport Canada*, 2024 CHRT 7 at paras 17-18).

[37] There are 3 steps in the Sherman test:

> (1) court openness poses a serious risk to an important public interest;
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
> (See *Sherman Estate* at para 38).

[38] The SCC further clarified:

> the discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)* (1983), 1983 CanLII 1707 (ON CA), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).
> (*Sherman Estate*, at para. 39)

[39] Moreover, the SCC also recognized the important public interest of privacy and the need to reconcile the public interest in privacy with the open court principle:

> For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.
> (See *Sherman Estate* at para 7).
>
> Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629, at para. 9 (CanLII)), and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that *"*[i]f we are serious about peoples*'* private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence – To the Better Administration of Justice" (2003), 8 *Deakin L. Rev*. 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.
> (See *Sherman Estate* at para 55).
>
> To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity.

> Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.
> (See *Sherman Estate* at para [85]).

[40] In other words, the SCC in *Sherman Estate* states that the "important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity". However, the "risk to this interest will be serious only when the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity" (*Sherman Estate* at para 85).

[41] Part of the issues raised in this confidentiality request focus on children and their parents or legal caregivers who are not parties and their sensitive medical information and/or other personal intimate information. This is part of the specific matrix of these proceedings given that an important component of this case pertains to services offered to First Nations children.

[42] Moreover, the Supreme Court of Canada recognized that:

> Recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law. This results in protection for young people's privacy under the *Criminal Code*, R.S.C. 1985, c. C-46 (s. 486), the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (s. 110), and child welfare legislation, not to mention international protections such as the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, all based on age, not the sensitivity of the particular child,
> (*A.B. v. Bragg Communications Inc*., [2012] 2 SCR 567 at para.17).

VI. Confidentiality order requests

[43] All submissions were carefully considered and will be addressed in turn below.

A. Category 1: Paragraph 24 of Ms. St-Aubin's Affidavit

[44] This category concerns the initials of the caregivers of children, details of their specific personal details and situations and the precise references to where this information

can be found in the materials filed in evidence essentially linking the AGC's evidence to other evidence in the materials filed that could allow anyone from the public to link the information together.

[45] In sum, the AGC submits that the ISC is concerned that the combined effect of the disclosure of these details on the public record could be injurious to the involved individuals. Ms. Matthews' Affidavit makes reference to potential child endangerment, which on its own is highly sensitive and personal. The public interest supports the redaction of this highly specific and sensitive information. Further, this and other information provided in Ms. Matthews' Affidavit (such as the regional location and need for particular type of care), together with the information contained in paragraph 24 of the St-Aubin Affidavit, if unredacted, could lead to the identification of the individuals involved. Disclosure could result in undue hardship.

[46] The Caring Society does not agree that the redacted information in paragraph 24 of Ms. St.-Aubin's affidavit, which point to portions of Ms. Mathews' affidavit describing proceedings before the Federal Court pose any risk of undue hardship to the individual noted in that paragraph. Ms. Mathews' affidavit is not the subject of a confidentiality order, the proceedings before the Federal Court are matters of public record and, indeed, are also noted in paragraph 27 of Ms. St-Aubin's affidavit in a sentence over which the Attorney General proposes no redactions.

(i) Question and comments from the Tribunal

[47] When this case started, the Tribunal and the parties agreed to redact all the names of children that are not already in the public domain. Jordan River Anderson and Phoenix Sinclair are examples of names of children in the public domain. This was a general rule to protect sensitive information about children who are not parties in this case. The *Merit Decision* (2016 CHRT 2) discusses specific cases involving children without providing any names. This does not prevent any reader to understand all the issues and why the Tribunal made findings of systemic and racial discrimination. The Tribunal believes this is an appropriate balancing act of public interests such as the best interest of children and

respecting their dignity, privacy, the risk to individuals who are third parties and their ability to control their core identity in the public sphere, the open court principle, freedom of expression and an open justice process, etc. An exception was made when children who tragically have committed suicide were already mentioned by name in the media because the parents wanted to raise awareness. Another exception was the case of S.J. where the Tribunal believed the Caring Society was authorized to use this situation as an example in the Tribunal proceedings. Moreover, no issue of a "mosaic effect" was apparent in SJ's case. In this request, the initials in question are mostly initials of the parents or caregivers rather than the initials of children. However, while this usually protects children, it is also true that a "mosaic effect" can occur in certain situations. The large amount of information filed coupled with the extremely short time to consider the confidentiality request does not assist the Tribunal to make an informed decision on every point in this request in the best interest of children.

[48] The Tribunal indicated it would discuss this with the parties in the near future. Given the two holidays on Friday March 29th and Monday April 1st and the cross-examination hearing that was starting on Tuesday April 2nd, the time constraints did not permit such a discussion at that time.

[49] The two cases referred to in paragraphs 24 to 29 of Ms. St.-Aubin's affidavit are before the Federal Court (one is on abeyance until April 22, 2024), under the two caregivers' full names not just initials. However, no other information is available to determine if the health condition of the children will be disclosed publicly or if the children will be identified with their full names, their initials or simply as "the child''. At this time, the information in the Court files is limited. Therefore, it is unclear what information is in the public record. The Tribunal is unaware what will be mentioned in the Federal Court's rulings. The Tribunal takes judicial notice that the firm Conway Baxter Wilson is named as representing the caregivers in the two cases. The lawyer in one case is Counsel Wilson and the other lawyer is Counsel David P. Taylor. Given that Conway Baxter Wilson has one of their lawyers, David Taylor representing the Caring Society before the Tribunal, the Panel wonders if Counsel David Taylor is in a position to let the Panel know if the caregivers have consented to share all the information related to the children they care for and contained in Ms. Mathews' affidavit with

the Tribunal and the Federal Court? This specific question is exceptional and only raised in response to the Caring Society's comments that the information about the two cases is of public record. This is not to be interpreted as the Tribunal's usual process.

[50] The Tribunal will revisit this at a later date, until such time, the interim confidentiality order will remain in place for paragraphs 24-29.

B. Category 2: Paragraph 23 of Ms. St-Aubin's Affidavit

[51] The AGC submits that paragraph 23 refers to a unique case involving multiple deaths in a family and resulting ceremonies, which are well known within the community. ISC is concerned that the individuals' initials, coupled with specific reference to the ceremonies, may lead an informed reader to make a deduction as to the individuals identity. As such, the redaction of the individuals' initials and reference to the ceremonies would diminish the likelihood of an informed reader identifying the individuals involved and consequent undue hardship.

[52] The Caring Society does not agree that the content in paragraph 23 related to this individual's concerns regarding cultural sensitivity or ISC's commitment to additional cultural training for staff should be redacted. The Attorney General has provided no basis for concluding that any statements regarding such a generic concern would impact this individual's core identity in the public sphere or otherwise cause undue hardship. Indeed, the information has more to do with the challenges this individual experienced with ISC, and not any needs arising in their family.

(i) Does the Court openness pose a serious risk to an important public interest? Is there a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public?

[53] Yes. The individuals' initials, coupled with specific reference to details including the name of the ceremonies and the information filed by the Caring Society in their materials, may lead an informed reader to make a deduction as to the individual's identity and the

identity of the children involved in the Jordan's Principle request. The persons involved including the children are third parties and their right to privacy is at risk.

[54] These individuals would not be able to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. Moreover, the risk to this interest is serious given the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individuals' biographical core in a manner that threatens their integrity.

[55] The Tribunal finds the term integrity to also include psychological integrity especially when it involves children.

[56] The Tribunal finds there is a real and substantial risk that the disclosure of personal information will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public.

[57] There is a reasonable expectation of First Nations persons who seek help for their children through Jordan's Principle, and who are often in difficult and emotional circumstances, that their personal and/or medical information associated with their identities will not be discussed in the media, posted online, be the object of documentaries and etc. without their consent.

[58] A request for Jordan's Principle services does not negate a third-party requestor's privacy or their right to control their child(ren)'s core identity in the public sphere to the extent necessary to preserve their dignity. Moreover, it does not mean that their child(ren)'s sensitive personal and medical information can be made public in these proceedings absent their consent or with some case-by-case exceptions.

[59] The above applies to this particular case. Although there is no medical information involved in this particular situation, the case deals with serious and difficult personal matters for the children involved. The Tribunal finds the potential for harm can be predicted with reasonable certainty in this case. The materials filed at the Tribunal also posted online and read together will make the identification of the persons possible absent an order under section 52 (1) (c) of the *CHRA*.

[60] However, this rationale does not apply for the portions referring to cultural sensitivity or ISC's commitment to additional cultural training for staff. The AGC failed to demonstrate a serious risk to an important public interest and undue hardship and failed to meet its burden of proof for those portions. On the contrary, it is in the public interest to have access to the information concerning public servants' trainings and approaches. Consequently, the answer to this first part of the test is negative in terms of the references to cultural sensitivity or ISC's commitment to additional cultural training for staff.

(ii) Is the order sought necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk?

[61] Yes. The Tribunal finds that, as described by Canada relying on the *(Attorney General) v. Khawaja*, there is a real risk for the ''mosaic effect'' to materialize. The redaction of the individuals' initials and reference to the specific details about the ceremonies would diminish the likelihood of an informed reader identifying the individuals involved and consequent undue hardship. If this is not done, the materials filed at the Tribunal also posted online and read together will make the identification of the persons possible. The order will not prevent members of the public and the media from understanding the matter.

[62] However, this rationale does not apply for the portions referring to cultural sensitivity or ISC's commitment to additional cultural training for staff. Given that the AGC failed to meet its burden of proof for those portions and failed to establish serious risk to an important public interest and undue hardship in the first part of the test, the answer to parts 2 and 3 are not required.

(iii) As a matter of proportionality, do the benefits of the order outweigh its negative effects?

[63] Yes. The need to protect the third-party children's privacy, dignity, integrity and personal information outweighs the negative effects of the minimal limits to openness in this case. Moreover, the order will not prevent members of the public and the media from

understanding the matter or accessing the evidence and other information in the Tribunal record except the initials.

[64] Pursuant to section 52 (1) (c) and 52 (2) of the *CHRA*, the confidentiality order is granted except for the following portions: ‘’to cultural sensitivity regarding the importance of’’; ‘’ additional cultural training for staff.’’. These words are not covered by the confidentiality order and should not be redacted.

C. Category 3: Paragraphs 20-22 and Exhibit “A” of Ms. St-Aubin’s Affidavit

[65] Akin to the category 1 above, this category concerns the initials of the caregivers of children, details of their specific personal details and situations and the precise references to where this information can be found in the materials filed in evidence essentially linking the AGC’s evidence to other evidence in the materials filed that could allow anyone from the public to link the information together.

[66] The AGC submits that the proposed redactions are necessary to prevent an informed reader from fitting pieces of otherwise innocuous information into the general picture and arriving at damaging deductions regarding a specific individual or child(ren). The proposed redactions are not only necessary to comply with the provisions of the *Privacy Act*, but also meet the threshold set out in *Sherman Estate* for a confidentiality order to prevent the inadvertent disclosure of such intimate and personal information about individuals, their lifestyle or their experiences. The AGC further submits that in 2018 CHRT 27, this Tribunal recognized the public interest in protecting sensitive personal information about First Nations children. The Tribunal also noted that privacy concerns might be heightened for people living in small communities, as the disclosure of even seemingly non-identifying information might allow individuals to be identified in the community. It is this type of information that the AGC seeks to protect in this case.

[67] The Caring Society is not opposed to the redactions proposed to paragraphs 20-29 and Exhibit “A” of Ms. St-Aubin’s affidavit.

[68] The Tribunal addressed the application of the *Sherman Estate* factors in the context of a privacy-related confidentiality order in *Nordhage-Sangster v Canada Border Services Agency et al*, 2023 CHRT 45, at paragraph 26:

> The language of section 52(1)(c) of the *CHRA* which requires a finding that a public inquiry poses a real and substantial risk of undue hardship to a person involved is consistent with the first part of the *Sherman Estate* test, that court openness poses a serious risk to an important public interest (...).
>
> **(i) Does the Court openness pose a serious risk to an important public interest? Is there a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public?**

[69] Yes. The individuals' initials, coupled with specific reference to case-specific details and the information filed by the Caring Society in their materials, may lead an informed reader to make a deduction as to the individual's identity and the identity of the children involved in the Jordan's Principle requests. The persons involved including the children are third parties and their right to privacy is at risk.

[70] These individuals would not be able to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. Moreover, the risk to this interest is serious given the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individuals' biographical core in a manner that threatens their integrity.

[71] The Tribunal finds there is a real and substantial risk that the disclosure of personal information and medical information will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public.

[72] Further, the Tribunal's comments on Jordan's Principle in request number 2 also apply to these particular cases in request number 3.

[73] In these cases, personal and medical information of First Nations children is at serious risk. The materials filed at the Tribunal also posted online and read together will

make the identification of the persons possible absent an order under section 52 (1) (c) of the *CHRA*. The Tribunal finds the potential for harm can be predicted with reasonable certainty in these cases.

(ii) Is the order sought necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk?

[74] Yes. The Tribunal finds that, as described by Canada relying on the (*Attorney General) v. Khawaja*, there is a real risk for the ‘’mosaic effect’’ to materialize. The redaction of the individuals’ initials and reference to the specific details about the cases would diminish the likelihood of an informed reader identifying the individuals involved and consequent undue hardship. If this is not done, the materials filed at the Tribunal and posted online and read together will make the identification of the persons possible. Moreover, the order will not prevent members of the public and the media from understanding the matter or accessing the evidence and other information in the Tribunal record except the initials.

(iii) As a matter of proportionality, do the benefits of the order outweigh its negative effects?

[75] Yes. The need to protect the children’s dignity, integrity and personal and medical information who are not part of these proceedings outweighs the negative effects of the minimal limits to openness in this case.

[76] Pursuant to section 52 (1) (c) and 52 (2) of the *CHRA*, the confidentiality order is granted.

D. Category 4: Exhibit C of Dr. Gideon’s affidavit

[77] The proposed redactions cover ISC file numbers and item numbers set out in Exhibit C of Dr. Gideon's affidavit.

[78] The AGC submits that the proposed redactions in Exhibit “C” are intended to protect ISC file numbers and item numbers. File numbers are unique identifiers assigned to

individual requestors. Each file number is related to a significant amount of information about the requestor, including every request they have made, the children on whose behalf the request is made, and all products, services and supports that were provided. ISC item numbers are connected to ISC file numbers, and denote the particular products, services or supports provided to an individual. While these numbers on their own may seem innocuous and administrative, when coupled with information contained in the Caring Society's affidavits, an informed reader – for example, a service coordinator or service provider - could discern unique and personal information that goes to the biographical core of the individual children, or family members.

[79] This is why the parties and the Panel must be cautious of the mosaic effect, and take reasonable and measured steps to prevent it. The proposed redactions in Exhibit "C" to the Dr. V. Gideon Affidavit, meet the threshold required by *Sherman Estate* and are a measured and appropriate step to prevent identification.

[80] The Caring Society does not agree that the redactions in Exhibit "C" to Dr. Gideon's affidavit protect any core biographical information whatsoever, as they relate to ISC case numbers (the randomized numbers ISC assigns to track requests) and "item IDs" (the number that ISC assigns to various items sought for approval within a particular request). There is no basis to conclude that these administrative processing details pose any risk to these individuals' ability to control their core identity in the public sphere or would otherwise cause undue hardship. Indeed, ISC case numbers have been left unredacted in other material filed before the Tribunal over the years.

(i) Does the Court openness pose a serious risk to an important public interest? Is there a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public?

[81] No. The Tribunal finds the AGC has failed to demonstrate that it meets the test in section 52 of the *CHRA* or the *Sherman Estate* test outlined in question 1. The AGC has failed to demonstrate any serious risk to an important public interest.

[82] The Tribunal agrees with the Caring Society on this point.

[83] Moreover, the Tribunal finds it is true that ISC case numbers have been left unredacted in other materials filed before the Tribunal over the years. Further, no substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons was proven in the past in these proceedings when the case numbers were left unredacted and the same finding and rationale can be applied here. The AGC failed to successfully distinguish the current request with the past approach in these proceedings in regard to ISC case numbers.

[84] Furthermore, the AGC did not effectively prove the occurrence of the mosaic effect (this criterion is not required every time in this case or in every case in front of the Tribunal however, in this confidentiality request it is an important consideration).

[85] Given the negative answer to the first part of the test, the Tribunal need not to move on to parts 2 and 3 of the test.

[86] The Confidentiality order is denied

E. Category 5: Exhibit E in Dr. Gideon's affidavit

[87] The AGC submits that the third-party information in Exhibit "E", relates to individuals who are or have been members of the External Expert Review (Appeals) Committee. It is unnecessary to release these names into the public domain, and could inadvertently result in the release of private contractors' information which could cause undue hardship.

[88] In sum, the Caring Society does not agree that the profiles of the Jordan's Principle external appeals committee members found in Exhibit "E" to Dr. Gideon's affidavit should be redacted. Canada has provided no specific submissions indicating that disclosure of the information in these profiles would "strike at the individual's biographical core in a manner that threatens their integrity", or indicating any sensitivity to this information at all.

[89] The profiles provide an overview of the professional qualifications and background of the individuals who hear appeals from ISC's denials of Jordan's Principle requests. They detail these individuals' connection to First Nations, Inuit and Métis communities in Canada.

The Caring Society does not agree that disclosure of this information would threaten these individuals' integrity or dignity, or cause undue hardship, in any way. Indeed, the information provided is the kind that is regularly listed on online services, such as LinkedIN, or in profiles provided for conference speakers. Indeed, all but two of the individuals in question have "online footprints" that already provide much of the information in these profiles, with one even having their position as a member of the external appeal committee listed on their LinkedIn profile. The two committee members for whom Caring Society counsel have not been able to find online profile information are nonetheless noted in their professional capacities on various websites. With respect to these two individuals, the Caring Society submits that, in the absence of evidence to the contrary, the Tribunal cannot take an absence of online profiles for these two individuals as indicative of any concern rising to the level considered in *Sherman Estate*, as applied in the context of section 52 of the *CHRA*. There are numerous explanations for the absence of such information, many of which are innocuous. As the party bearing the burden on this motion, it is for Canada to satisfy the Tribunal that the redactions are appropriate and necessary.

[90] Further, the Caring Society submits that even if the *Privacy Act* were somehow relevant to the Tribunal's determination of the section 52 motion, it bears noting that the *Privacy Act* permits the use/disclosure of personal information that is consistent with the purpose for which it was gathered (ss. 7 and 8(2)(a)) and authorizes disclosure of personal information to the Attorney General of Canada for use in legal proceedings involving the Government of Canada (s. 8(2)(d)). The Caring Society's position is that ISC's defence of its own system for handling Jordan's Principle requests is certainly a use consistent with the purpose for which the profile information was gathered.

[91] Moreover, even if there were some kind of hardship associated with the disclosure of these profiles, the Caring Society submits that any such hardship (which is denied) does not outweigh the important societal interest in the transparency of the Tribunal's process. On ISC's evidence, there are hundreds of thousands of Jordan's Principle requests made each year. Any of these could end up before the members of ISC's external appeals committee. The public has an interest in knowing the credentials of these decision-makers,

as they hold positions that are very important to the wellbeing of First Nations children throughout Canada.

(i) Does the Court openness pose a serious risk to an important public interest? Is there a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public?

[92] No. The Tribunal finds the AGC has failed to demonstrate that it meets the test in section 52 of the *CHRA* or the *Sherman Estate* test outlined in question 1.

[93] Moreover, the Tribunal finds the AGC has not met its high bar and has failed to demonstrate a serious risk to the individuals' interests that the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity (*Sherman Estate* at para 85).

[94] The Tribunal finds the AGC has failed to demonstrate a heightened level of impact on the individuals involved: "Undue hardship is more than ordinary hardship. There must be evidence of harm, or the potential for harm must be predicted with reasonable certainty." (See *Cherette v Air Canada*, 2024 CHRT 8 at para. 75).

[95] The Tribunal agrees with the Caring Society and the Commissions' positions on this request.

[96] The Tribunal finds the Appeals Committee is an external nongovernmental panel of experts from regulated and certified disciplines in health, education and social sectors. The objective of the Appeals Committee is to provide ISC with recommendations on appeals utilizing their professional knowledge and expertise.

[97] Currently, the Appeals Committee consists of nine consultants who have been contracted through a request for proposals process. All of these consultants are either Indigenous, have lived and worked with Indigenous communities, or have longstanding

expertise in serving Indigenous communities across Canada, (See Affidavit of Dr. Valerie Gideon, dated March 15, 2024, pages 16-17 at paras 55-56).

[98] While the committee is described as nongovernmental by Canada, the Tribunal finds the Appeals committee is assisting the Federal government to perform its legal mandate under Jordan's Principle under the Tribunal's orders. For example, at Exhibit E (E) of the Affidavit of Dr. Valerie Gideon, dated March 15, 2024, The Appeals Committee states as follows: *This development of the new, more independent appeals process has been underway since April 2018 with the parties to the Canadian Human Rights Tribunal discrimination case on First Nations child and family services and Jordan's Principle. (…) We have found our role as Appeal Committee members to be a privileged one. We fully appreciate the impact of our decisions on the lives of First Nations children and their families. The needs are so high and the contexts and stories of these children have stayed with us. Decisions are very rarely simple. At the appeals level, you will see the most complex requests – often requests are part of a list of other requests that have been approved. Many children have recurring supports from Jordan's Principle and their relationship with Jordan's Principle is not one-time, but over many years.*

[99] Further, Canada does not offer a rationale for this confidentiality request, aside from the general point that the information is personal information. As stated above, even if a document contains personal information, that is not enough to justify an exception to the open court principle. There must also be a basis for concluding the requirements of s. 52(1) and *Sherman Estate* are met.

[100] The Tribunal agrees with the Commission that the *Privacy Act*, s. 3 – definition of "personal information", paragraphs (j) and (k), does not include names or other prescribed information about government employees, or persons contracted to perform services for government institutions. These statutory exclusions show the existence of a public interest in having access to information about those who perform governmental services.

[101] The Tribunal finds the evidence establishes that most members of the ISC's external Appeals Committee already have public profiles with their full names, pictures and

information about them. However, even if they did not have public profiles, the very nature of their work militates in favour of openness rather than privacy.

[102] Natural justice and fairness require that the full names, professions and credentials of the members of a committee appointed by the Federal government in compliance with the Tribunal's orders to consider appeals in Jordan's Principle requests should be publicly accessible. Moreover, the individuals' personal addresses are not disclosed, rather it is their work addresses that are made public here. The Tribunal finds no infringement to privacy, dignity or any striking at the individuals' biographical cores in a manner that threatens their integrity.

[103] Given the negative answer to the first part of the test, the Tribunal need not to move on to parts 2 and 3 of the test.

[104] The AGC has failed to meet its burden of proof on this request and the strong presumption for public proceedings under the *CHRA* remains here.

[105] The Confidentiality order is denied.

VII. Order

[106] Confidentiality order requests granted in part pursuant to section 52 (1) (c) and 52 (2) of the *CHRA* for categories 2 (except the wording identified above) and 3.

[107] The confidentiality order requests are denied for categories 4 and 5.

[108] Category 1 remains under an interim confidentiality order. At the time of the release of this ruling, the requested information referred to above in paragraph 49, has now been received. The Tribunal will revisit the interim confidentiality order for this category to determine if it should be lifted or be made permanent. This point will be the object of a separate ruling.

A. Timeline

[109] The AGC shall update the affidavits and materials to reflect the entirety of the orders above and file electronic and two hard copies with the Tribunal and share electronic copies with the parties, no later than April 2, 2024. At the time of the release of this ruling, the AGC has complied with this timeline and order.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
July 30, 2024

Canadian Human Rights Tribunal

Parties of Record

Motion dealt with in writing without appearance of parties

Written representations by:

David P. Taylor, Sarah Clarke and Kevin Droz, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke, Lacey Kassis, and Adam Williamson, counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

Christopher Rupar, Senior General Counsel, Paul Vickery, Sarah-Dawn Norris, and Meg Jones, Counsel. Dayna Anderson, General Counsel, Kevin Staska, Samantha Gergely, Counsel, Attorney General of Canada, the Respondent

Maggie Wente and Darian Baskatawang, counsel for the Chiefs of Ontario, Interested Party.

Julian Falconer, Christopher Rapson, Shelby Percival, counsel for the Nishnawbe Aski Nation, Interested Party